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FEB 27 2004

No. 03-725

IN THE

Supreme Court of the United States

DAVID B. PASQUANTINO, CARL J. PASQUANTINO & ARTHUR HILTS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating its substantial interest in substantive criminal law and the ambit of the mail fraud statute and the definition of "property" thereunder.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and in all 50 states. Members of NAM are subject to increased use of criminal penalties in the regulatory state and to the uncertainty that attends the obligation to comply with laws and regulations of multiple (domestic and foreign) jurisdic-

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than *amicus*, its members, or its counsel contributed monetarily to the brief.

tions whose own construction of those laws is often ambiguous.

SUMMARY OF ARGUMENT

The federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, prohibit only schemes to defraud victims of *property*. Federal prosecutors and courts have sometimes ignored this basic constraint, stretching the statutes to criminalize schemes involving bribery, breach of fiduciary duties, public corruption, and false statements to state and local regulatory authorities. Following years of successful prosecutions, this Court reversed these efforts to expand the mail and wire fraud statutes. *See McNally v. United* States, 483 U.S. 350 (1987); *United States v. Cleveland*, 531 U.S. 12 (2000). In doing so, this Court made clear that the statutes protect only "traditional theories of property" and that ambiguities about the statutes' coverage "should be resolved in favor of lenity." *Cleveland*, 531 U.S. at 24-25 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). This Court has refused to sanction such "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.*

Despite this very clear and very recent guidance, in this case and others like it, prosecutors and courts have continued to stretch the mail and wire fraud statutes to protect an alleged property right that was unenforceable under common law and the laws of the states: the right of a foreign government to allegedly accrued but unassessed and uncollected taxes.

As explained in the petition, the federal courts of appeal are sharply divided on the propriety of bringing such prosecutions. For that reason alone, this Court should grant certiorari. *See* Sup. Ct. Rule 10. This case requires this Court's review for a separate reason. Although this Court has repeatedly explained the dangers of interpreting the language of the mail and wire fraud statutes beyond traditional notions

of property, courts and prosecutors continue to do so, thereby dangerously expanding federal criminal jurisdiction. In this case, the expansion is particularly unworkable, and will inevitably lead to complicated disputes about foreign law and conflicts with foreign governments. This Court should therefore grant certiorari to return the mail and wire fraud statutes to their sound moorings in protecting traditional forms of property. This Court should do promptly, to avoid a spate of habeas litigation like the one that followed its decision in *McNally*.

ARGUMENT

I. THE FEDERAL GOVERNMENT'S CAMPAIGN TO ENFORCE AN EXPANSIVE INTERPRETATION OF THE FRAUD STATUTES HAS CAUSED ANOTHER CIRCUIT SPLIT.

Over the past thirty years, federal prosecutors have repeatedly sought to expand the reach of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, to criminalize conduct not covered by the language of these statutes, sometimes to the consternation of federal judges. *See United States v. Evans*, 844 F.2d 36, 41 (2d Cir. 1988) ("We are particularly loathe to expand the wire and mail fraud statutes further, since we have already 'tolerated an extraordinary expansion' of these laws") (quoting *United States v. Weiss*, 752 F.2d 777, 791 (2d Cir. 1985) (Newman, J., dissenting)); *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) ("If judges perceive a need for a catch-all federal common law crime, the issue should be addressed explicitly with some recognition of the dangers, rather than continue an inexorable expansion of the mail and wire fraud statutes under the pretense of merely discharging Congress' will") (Winter, J., concurring in part and dissenting in part).

In spite of the current controversy, certain limits on fraud prosecutions are, by now, well-established. This Court has

repeatedly made clear that Congress intended the mail and wire fraud statutes to protect "property rights." *McNally v. United States*, 483 U.S. 350, 356 (1987) (mail fraud); *Carpenter v. United States*, 484 U.S. 19, 28 (1987) (wire fraud). As this Court explained more than a century ago, Congress enacted the mail fraud statute "with the purpose of *protecting the public* against all such intentional efforts to despoil, and prevent the post office from being used to carry them into effect...." *Durland v. United States*, 161 U.S. 306, 314 (1896) (emphasis added). This interpretation is consistent with the views of one of the sponsors of the mail fraud statute, who described the purposes of the bill in the 41st Congress: "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing *the innocent people in the country*." *See McNally*, 483 U.S. at 356 (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)) (emphasis added). Representative Farnsworth was clearly concerned exclusively with protecting the property of persons within the United States, as opposed to enforcing the tax revenue of foreign governments, when he described the frauds giving rise to the Committee's revised bill: "[t]hus *all through the country* thousands of innocent and unsophisticated people, knowing nothing about the ways of these city thieves and robbers, are continually fleeced and robbed, and the mails are made use of for the purpose of aiding them in their nefarious designs." Cong. Globe, 41st Cong., 3d Sess., 35 (emphasis added).

Despite the clarity of the statutory language and purpose, the government has been able to mount two efforts, each ultimately rejected by this Court, to expand the definition of "property" to encompass rights and interests not protected by the statutes. In the first, the government used the fraud statutes to obtain numerous convictions for fraudulent schemes designed not to take tangible property, but rather to deprive victims of "honest services" to which they were entitled by

law or some fiduciary relationship.[2] In the second, the government used the fraud statutes to obtain numerous convictions of individuals who had used misrepresentations or otherwise dishonest means to obtain licenses from state or local governments and their agencies.[3] With each of these efforts, this Court granted certiorari and ultimately ruled that the

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[2] *See, e.g., United States v. Bruno*, 809 F.2d 1097, 1106 (5th Cir. 1987) (fraud related to honest services of a judge); *United States v. Lovett*, 811 F.2d 979, 986 (7th Cir. 1987) (fraud related to honest services of a mayor); *United States v. Price*, 788 F.2d 234, 237 (4th Cir. 1986) (fraud related to honest services of union management); *United States v. Qaoud*, 777 F.2d 1105, 1113 (6th Cir. 1985) (fraud related to honest services of a judge); *United States v. Murphy*, 768 F.2d 1518, 1530 (7th Cir. 1985) (fraud related to honest services of a judge); *United States v. Alexander*, 741 F.2d 962, 964-65 (7th Cir. 1984) (fraud related to honest services of tax assessors); *United States v. Venneri*, 736 F.2d 995, 997 (4th Cir. 1984) (fraud related to honest services of an employee); *United States v. Clapps*, 732 F.2d 1148, 1153 (3d Cir. 1984) (fraud related to state elections); *United States v. McManigal*, 708 F.2d 276, 283 (7th Cir. 1983) (fraud related to honest services of tax assessors); *United States v. Buckley*, 689 F.2d 893, 901 (9th Cir. 1982) (fraud related to lobbying services); *United States v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981) (fraud related to an attorney's loyalty); *United States v. Goss*, 650 F.2d 1336, 1346 (5th Cir. 1981) (fraud related to honest services of an agent or employee); *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980) (fraud related to honest services of an agent or employee); *United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir. 1974) (related to honest services of a public official).

[3] *See, e.g., United States v. Shotts*, 145 F.3d 1289, 1297 (11th Cir. 1998) (bail bond licenses); *United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997) (video poker licenses); *United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992) (liquor license); *United States v. Schwartz*, 924 F.2d 410, 419 (2d Cir. 1991) (export licenses); *United States v. Granberry*, 908 F.2d 278, 280-81 (8th Cir. 1990) (school bus driver permits); *United States v. Martinez*, 905 F.2d 709, 716 (3d Cir. 1990) (medical licenses); *United States v. Kato*, 878 F.2d 267, 269 (9th Cir. 1989) (private pilot licenses); *Toulabi v. United States*, 875 F.2d 122, 126 (7th Cir. 1989) (taxi operator licenses); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling licenses); *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. 1988) (licenses to conduct bingo games).

government, and many courts, had gone too far because they had strayed from the purpose of the statute, thereby extending the federal government into areas typically left to the states. *See McNally*, 483 U.S. at 361 (mail fraud statute does not criminalize fraudulent scheme to deprive "honest services"); *Cleveland*, 531 U.S. at 24 (mail fraud statute does not criminalize fraudulent scheme to secure state-issued licenses).

In limiting the scope of "property" in *McNally*, this Court emphasized that "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." 483 U.S. at 360 (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)). Refusing to read the statute in a way that "leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," this Court made clear that § 1341 is "limited in scope to the protection of property rights." *Id.* In short, without "clear and definite language" from Congress, this Court declined to select a "harsher" reading of a criminal statute that expanded federal criminal law. *Id.*

In *Cleveland*, this Court reiterated and expanded the same message, providing lower courts with a detailed methodology for interpreting "property" in the mail and wire fraud statutes. Relying on the legislative history discussed above, *see supra* at 4-7, this Court rejected "the Government's theories of property rights which stray from traditional concepts of property." 531 U.S. at 24. There, the government argued that Louisiana's interest in regulating video poker licenses was a "property right," in part, because of the stream of income derived from the licensing scheme. The Court ruled that such an expectation of income was not adequate to create a property interest and that Louisiana's exercise of its licensing authority was a "paradigmatic exercise[] of the State's traditional police powers." *Id.* at 23.

Similarly here, Canada's interest in collecting its excise tax "surely implicates [its] role as a sovereign, not as property holder." *Id.* at 24.

In short, this Court explained that the "property" protected by these statutes must be understood in terms of "traditional theories of property" and that any ambiguity in its meaning "should be resolved in favor of lenity." 531 U.S. at 25. This Court also made clear that it will not "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24. Finally, the Court made clear that the only schemes prohibited by the mail and wire fraud statutes are those that aim to take "property" that is "in the hands" of the victim. *Id.* at 15. Thus, according to this Court's clear direction, before allowing a prosecution under the mail and wire fraud statutes, courts must assure themselves that the alleged scheme seeks to take away clearly defined "property" that is already in the hands of the victim, and that Congress gave clear indication of its intent to criminalize the conduct.

Despite this recent history and clear guidance, the government has persisted in advancing aggressive readings of the fraud statutes that remain untethered to traditional views of the "property" that those statutes were designed to protect. In this case and others like it, the government now seeks to impose punishment for fraud related to "property rights" allegedly created by operation of foreign revenue laws. As explained in the petition, this effort has resulted in an acknowledged split and considerable confusion among the federal courts of appeals. (*See* Pet. 11-18). No court or litigant to address the issues presented by this petition has cited a single case – or any other authority – to support the proposition that Congress intended §§ 1341 and 1343 to protect property interests allegedly belonging to foreign governments under foreign law. For these reasons, the Court should grant certiorari to review the use of the fraud statutes

for offenses outside Congress' stated intent, thereby ensuring adherence to the teachings of *McNally* and *Cleveland* and also resolving the deepening circuit split.

II. UNCOLLECTED FOREIGN TAX REVENUE IS NOT "PROPERTY" WITHIN THE MEANING OF THE FRAUD STATUTES.

The government's case below rested on the theory that alleged efforts to avoid payment of taxes purportedly due under Canadian law – though not assessed, adjudicated, or otherwise reduced to enforceable form by any Canadian governmental authority – amounted to a scheme to deprive the Canadian government of "property," in violation of the wire fraud statues. For several reasons, this theory is entirely inconsistent with this Court's guidance in *McNally* and *Cleveland*.

A. Canada's Interest in Unassessed and Uncollected Taxes is Not a Property Right Under State or Common Law.

First, the victim of the alleged scheme – the Canadian government – never had any "traditional" form of property in its hands. No Canadian authority had any judgment against the defendants or any other party. Nor did it hold any money or property in its coffers that the defendants caused it to part with as a result of fraudulent devices. At most, the Canadian government had a theoretical right to assess a tax and enforce a payment, but it never exercised that right. More important, even if there were a right to payment under Canadian law, the well-established common law revenue rule would still have barred the Canadian government from protecting that right in the courts of the United States.

The Fourth Circuit's analysis fundamentally fails to recognize the absence of a foreign government's cognizable "property right" in revenue under the common law revenue rule. While the Fourth Circuit doubted that the rule was anything more than a permissive doctrine, its analysis of the history and development of the rule conflicts with even the application recognized by courts in Canada,[4] the alleged victim of the Petitioners' prosecution:

> It is a rule of the common law in force in the province of Alberta that: "The Court has no jurisdiction to entertain an action (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state:" *Dicey and Morris, Conflict of Laws*, 8th ed., R. 21, P. 160. The basis for this rule was contained in the words uttered by way of dictum by Lord Mansfield in *Holman v. Johnson* (1775), 1 Cowp 341, at 343, 98 ER 1120, as follows: ". . . no country ever takes notice of the revenue laws of another." This judicial doctrine has been followed vigorously in decisions of the highest courts of England and it has now

[4] Although not recognized by the Fourth Circuit, various foreign jurisdictions view the common law revenue rule as a well-established principle of international law. *See e.g.*: **Canada**:, *In re Dwelle Estate*, [1969] 69 W.W.R. 212; **Hong Kong**: *In re Anson Garment Ltd.*, [2003] HKEC 683 ("The general rule at common law is revenue laws of a foreign country are not enforced by the local courts."); **Ireland**: *Byrne v. Conroy*, [1999] 2 C.M.L.R. 617, 618 ("The courts of Ireland would not enforce the revenue claims of another country."); **New Zealand**: *Attorney General v. Wellington Newspapers Ltd.*, [1989] 2 F.S.R. 691, 713 ("It is a well settled principle of private international law that: 'English courts have no jurisdiction to entertain an action--(1) [f]or the enforcement, either directly or indirectly, of a ...revenue ...law of a foreign state....This principle applies equally to New Zealand courts."); **Scotland**: *Scottish National Orchestra Soc'y Ltd. v. Thomson's Ex'r*, [1969] S.L.T. 325, 328 ("Foreign Revenue laws are not enforceable in the Scottish courts."); **United Kingdom**: *Qrs 1 Aps v. Frandsen*, [2000] I.L.Pr. 8 ("It is a fundamental principle of English law that our courts will not directly or indirectly enforce the penal, revenue or other public laws of another country.").

> been established that same is in full force and effect in Canada.

In re Dwelle Estate, [1969] 69 W.W.R. 212.[5]

Courts – even those that have reversed convictions like Petitioners' – have consistently misapprehended the significance of the revenue rule in the context of the fraud statutes. While some have held the rule to be a permissive doctrine, allowing courts to refrain from giving effect to foreign revenue laws, *see United States v. Pasquantino*, 336 F.3d 321, 340-41 (4th Cir. 2003) (en banc); *European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 483 (E.D.N.Y. 2001), and others describe the rule as jurisdictional because, under this view, courts may not give effect to foreign revenue laws, *see United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996), the distinction is irrelevant for purposes of the fraud statutes. The importance of the common law revenue rule is not only whether the rule, of its own force, precludes a prosecution,[6] but also the extent to which the rule evi-

[5] It is not surprising, then, that research has revealed no case in which Canada prosecuted an individual for allegedly defrauding the U.S. government of tax revenue. Indeed, the absence of any reciprocal offense under Canadian law to punish those who smuggle goods into the United States would have precluded Petitioners' conviction under the applicable U.S. smuggling statute, 18 U.S.C. § 546. *See United States v. Miller*, 26 F. Supp. 2d 415, 426 (N.D.N.Y. 1998) (Canada lacks outbound smuggling that that could satisfy the reciprocity requirement of § 546).

[6] Indeed, the Court below misapprehended this point with its focus on whether the Petitioners' criminal conviction was tantamount to enforcement of Canada's revenue law. It should be noted, however, that the Fourth Circuit's reasoning even on this point was flawed. The penalties required after such a conviction include a term of incarceration that is based on the application of the foreign law giving rise to the alleged tax, as well as a mandatory restitution award that, inescapably, must be based on the amount of taxes owed. *See infra* at n. 8 (and accompanying text) (discussing mandatory restitution pursuant to 18 U.S.C. § 3663A(c)(1)).

dences the absence of a cognizable "property right" under common law and the laws of the states.

All courts agree that the doctrine, whether permissive or mandatory, is firmly embedded in the common law and any court can invoke it to prevent a foreign sovereign from seeking to enforce its revenue laws within its jurisdiction. The doctrine was, in fact, "so well recognized" that it was not until the 1970's – well after passage of both the mail and wire fraud statutes – that a foreign government sued in an American court to enforce a foreign tax judgment. *See Her Majesty v. Gilbertson*, 597 F.2d 1161, 1164 (9th Cir. 1979). Even in that case, the court refused to enforce the judgment, saying that the revenue rule "has been with us for centuries and as such has become firmly embedded in the law." *Id.* at 1166. Research has found no case in which a court ever enforced a foreign government's tax judgment in an American court, a fact that numerous commentators have recognized and some have bemoaned. *See generally*, Robert A. LeFlar, Extrastate *Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193 (1932); *Extraterritorial Collection of State Inheritance Taxes*, 29 Col. L. Rev. 782 (1929); Charles F. Midkiff, Note, *Extraterritorial Enforcement of Tax Claims*, 12 Wm. & Mary L. Rev. 111 (1970); Adrian Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, 2001 Sing. J. Legal Stud. 280 (2001); Nathaniel L. Goldstein, *Interstate Enforcement of Tax Laws of Sister States*, 30 Taxes 247 (1952).

In light of the fact that no court has ever enforced a foreign government's "right" to collect revenue in an American courtroom, the inescapable conclusion is that such a "property right" does not exist at common law or under the laws of the states. *See Ruckelhaus v. Monsanto*, 467 U.S. 986, 1001 (1984) ("'[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law'") (quot-

ing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972))); *Borre v. United States*, 940 F.2d 215, 220 (7th Cir. 1991) ("It is logical, therefore, for this court to look to state law [to define property] for the purposes of the mail fraud statute"). Simply put, a person can depart from a foreign jurisdiction with proceeds to which the foreign government claims a right under its revenue laws, and American courts will not enforce the sovereign's right to collect the money. *See Gilbertson*, 597 F.2d at 1162-63. This rule was so well established at the time that Congress passed the mail and wire fraud statutes that states often would refuse to enforce tax judgments obtained by sister states. *See, e.g., State of Colorado v. Harbeck*, 133 N.E. 357 (N.Y. 1921); *Moore v. Mitchell*, 30 F.2d 600, 602-03 (2d Cir. 1929). While this latter trend has sensibly given way to the Constitution's "full faith and credit clause," *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 272-77 (1935), no American court has directed the surrender of money or property from an individual to a foreign government on account of revenues owed.[7]

[7] Although the revenue rule yielded to the Constitution's "full faith and credit clause" some time ago, the barrier to enforcing the collection of taxes owed to a foreign sovereign remains well rooted in common law precedent. The distinction between sister states and foreign sovereigns is clear and arises out of our dual system of government:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation....

Milwaukee County v. M. E. White Co., 296 U.S. 268, 277 (1935). The full faith and credit clause, upon which *M.E. White* was decided, clearly does not apply to foreign sovereigns and, hence, U.S. courts have never extended the rule in *M.E. White* to apply to the enforcement of uncollected tax revenue of such foreign sovereigns.

Thus, the lower courts' discussions of whether the revenue rule is permissive or mandatory, and whether the policies that underlie it are valid or antiquated, have little bearing on the viability of this prosecution. The Canadian government had no property or enforceable property right in its hands, and the fact remains that the federal government attempts, with prosecutions such as those against Petitioners, to protect a right in "property" that historically enjoys no protection under common law or the laws of the states, a right beyond "the traditional concepts of property." *See Cleveland*, 531 U.S. at 24. Such attempts cannot survive this Court's prior jurisprudence – or its scrutiny in this case.

Indeed, the government's conduct in this case effectively conceded that the Canadian government did not have a property interest protected by the wire fraud statute. Although the Mandatory Victims Restitution Act requires the court to impose a restitution order following conviction for the instant offense,[8] the government did not seek a restitution order in this case, stating that such an award was "not appropriate in this case since the victim is a foreign government and the loss derives from tax laws of the foreign government." *See* Govt's Statement of Facts and Applicable Sentencing Factors at 3 (Feb. 16, 2001). Thus, the Government conceded that, whatever Canada's interest in uncollected taxes, that interest was insufficient for a restitution award, a

[8] *See* 18 U.S.C. § 3663A(c)(1)(A)(ii) (mandating restitution if the crime is "an offense against property under this title . . . including any offense committed by fraud or deceit"); § 3663A(c)(1)(B) (mandating restitution for crimes "in which an identifiable victim or victims has suffered . . . pecuniary loss"); *see also United States v. Bright*, No. 02-50492, -- F.3d --, 2004 WL 25017, at *5 (9th Cir. Jan. 5, 2004) (18 U.S.C. § 3663A(c)(1)(A)(ii) mandates restitution for mail fraud offenses); *United States v. Vanhorn*, 344 F.3d 729, 730 (8th Cir. 2003) (same); *United States v. Hasson*, 333 F.3d 1264, 1275 (11th Cir. 2003) (mandating restitution for mail and wire fraud pursuant to § 3663A(c)(1)(B)); *United States v. Coriaty*, 300 F.3d 244, 252 (2d Cir. 2002) (restitution mandatory under 18 U.S.C. § 3663A(c)(1)(A)(ii) for wire fraud).

concession fundamentally at odds with its claim that the property interest was within the protection of the wire fraud statute.

B. Application of the Rule of Lenity Requires Reversal of Petitioners' Convictions.

Making this case all the more unusual, the government has essentially argued before this Court that the definition of "property" in the fraud statutes has two meanings – one when it attempts to prosecute individuals for schemes to evade foreign tax laws but a different, more limited definition – one reflecting the common law revenue rule – when foreign governments attempt to collect civil judgments under the RICO statute based on patterns of mail and wire fraud. *See* Brief for the United States as Amicus Curiae at 7, 16, *Attorney General of Canada v. R.J. Reynolds Tobacco Holding, Inc.* (S. Ct. case no. 01-1317) (Oct. 2002). Such a dichotomy turns an established canon of statutory construction, the rule of lenity, on its head.

This "venerable principle," *Moskal v. United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting), requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). This Court has "[i]n various ways over the years . . . stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the hasher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). Justice Scalia's dissent in *Moskal* states succinctly what has been an unwavering principle of construction for federal criminal statutes: "[t]he temptation to stretch the law to fit the evil is an ancient one, and it must be resisted." 498 U.S. at 132.

Indeed, both *McNally* and *Cleveland* rely on this rule to constrain the federal government's attempts to expand the scope of the mail fraud statute, including the very definition of "property." *See Cleveland*, 531 U.S. at 25 ("In deciding what is 'property' under § 1341, we think 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite'") (quoting *Universal C.I.T. Credit Corp.*, 344 U.S. at 221-22); *McNally*, 483 U.S. at 360 ("Rather than construe the statute in such a manner that leaves its outer boundaries ambiguous . . . we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has").

Here, even if one could conclude that there is an open question concerning Congress' intentions,[9] that question must be resolved by applying the rule of lenity, a principle that the Fourth Circuit failed to address in its analysis. Indeed, the *Pasquantino* court, and for that matter the *Trapilo* court, chose to apply the harsher of two definitions of "property," notwithstanding the dearth of any precedent that Congress intended the harsher alternative. *United States v. Trapilo*, 103 F.3d 547, 552 & n.8 (2d Cir. 1997). Following this Court's directive in *McNally* and *Cleveland*, the Fourth Circuit should have required Congress to "speak more clearly than it has" before the courts may interpret the definition of "property" to encompass a property right that cannot be enforced in an American court under the laws of the states and the common law. *McNally*, 483 U.S. at 360.

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[9] As noted above, *see supra* at 4-7, the legislative history includes no evidence whatsoever that Congress intended to protect the right of a foreign sovereign in accrued but uncollected "sin taxes" under the mail fraud statute; actually the legislative history suggests only that Congress intended to protect the U.S. public from fraudulent schemes.

III. COLLATERAL CONSEQUENCES FAVOR GRANTING CERTIORARI NOW.

For all of the foregoing reasons, the Fourth Circuit's analysis of the mail fraud statute fundamentally conflicts with this Court's guidance in *McNally* and *Cleveland*. Along with the clear conflict among the circuits, this striking departure calls for this Court's prompt review. There are at least three additional reasons for this Court to grant certiorari and decide this question immediately.

First, the Court can promptly clarify the scope of the mail and wire fraud statutes and avoid the kind of wasteful and destructive prosecutions that preceded *McNally*. Granting certiorari now, and resolving this issue before a proliferation of government prosecutions under this novel theory, will eliminate the burden on federal courts of not just prosecutions, but the collateral attacks that will inevitably result should the government's interpretation of the mail and wire fraud statutes be later discredited, as it was in *McNally* and *Cleveland*, long after many people had been convicted and imprisoned.[10]

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[10] *See, e.g., Lomelo v. United States*, 891 F.2d 1512, 1519 (11th Cir. 1990) (affirming denial of relief under 28 U.S.C. § 2255 because although *McNally* applied retroactively, conviction necessarily also involved a finding that the government was deprived of money or property, as well as honest services); *United States v. Walgren*, 885 F.2d 1417, 1424 (9th Cir. 1989) (reversing district court to apply *McNally* retroactively and grant *coram nobis* relief); *Callanan v. United States*, 881 F.2d 229, 234 (6th Cir. 1989) (reversing district court, in part, to apply *McNally* retroactively and vacate mail fraud convictions pursuant to 28 U.S.C. § 2255); *United States v. Marcello*, 876 F.2d 1147 (5th Cir. 1989) (reversing district court to grant petitioners' requests pursuant to 28 U.S.C. § 2255 and petition for writ of error *coram nobis* relief to vacate RICO conviction predicated on violations of mail and wire fraud statutes); *United States v. Mitchell*, 867 F.2d 1232, 1234 (9th Cir. 1989) (reversing district court's denial of relief under 28 U.S.C. § 2255); *United States v. Osser*, 864 F.2d 1056, 1064 (3rd Cir. 1989) (denying *coram nobis* relief because indictment also charged, and evidence was presented

Second, the Fourth Circuit's rule will inevitably lead to complicated and unwieldy prosecutions. In order to establish a scheme to defraud based on failure to pay foreign taxes, the government must necessarily prove that the foreign state had a right to collect taxes under its domestic law, and that the defendant intended to defeat that right. Thus, every case tried under this theory will involve complicated questions of tax law, requiring the development and presentation of expert testimony about the intricacies of civil and criminal foreign law. As the defense bar is not typically versed in the requirements of foreign tax laws or in the possible defenses to charges of foreign tax evasion, prosecutions based upon foreign tax violations will necessarily impose additional expense and delay.

Third, requiring U.S. courts and juries to determine the contours of foreign tax laws is likely to create friction and conflict with foreign governments. A case recently prosecuted under the Lacey Act, 16 U.S.C. § 3372(a)(2)(A), illustrates that this is more than a hypothetical concern. That statute prohibits the importation of "fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law." *Id.* In *McNab v. United States*, 331 F.3d 1228 (11th Cir. 2003), petition for cert. pending, No. 03-622, the government obtained a conviction on the theory that the defendants had imported lobsters taken and packaged in ways that violated the laws of Honduras.

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of, a monetary loss); *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988) (affirming grant of *coram nobis* relief); *Magnuson v. United States*, 861 F.2d 166, 169 (7th Cir. 1988) (affirming grant of relief under 28 U.S.C. § 2255); *United States v. Keane*, 852 F.2d 199, 206 (7th Cir. 1988) (affirming denial of *coram nobis* relief); *United States v. Shelton*, 848 F.2d 1485, 1497 (10th Cir. 1988) (applying *McNally* retroactively to vacate mail fraud convictions pursuant to 28 U.S.C. § 2255); *Ingber v. Enzor*, 841 F.2d 450, 456 (2d Cir. 1988) (applying *McNally* retroactively and affirming district court's grant of relief under 28 U.S.C. § 2255).

Incorporating the law of foreign jurisdictions into American criminal statutes increases the likelihood that U.S. courts will create undesirable conflicts between their interpretations of foreign laws and those of the foreign sovereign. *See Boots*, 80 F.3d at 588 ("[t]he longstanding rule instructs the court to leave this area alone…so that a foreign government's revenue laws are not subjected to intrusive scrutiny by the courts of this country"). In *McNab*, for example, the trial and appellate proceedings involved extensive evidence concerning Honduran law and regulations. During those proceedings, the courts received different views from the Honduran government about the applicable rule. In affirming the conviction, the Court of Appeals for the Eleventh Circuit ultimately rejected the views expressed by the Embassy of Honduras during the appeal. Thus, the conviction rested upon a view of Honduran law rejected by at least one branch of the Honduran government, placing our courts at odds with another nation. Undesirable conflicts of this kind are likely to arise under any statute that incorporates foreign law, as U.S. courts would be compelled to scrutinize foreign laws and judgments. This unfortunate reality provides a strong reason not to read foreign law into U.S. penal law unless expressly authorized by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Dated: February 27, 2004